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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re J.S., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. J.S., Defendant and Appellant.	A141270 (City and County of San Francisco Super. Ct. No. JW14-6033)

J.S. appeals from jurisdictional and dispositional orders after the juvenile court sustained allegations of carrying a concealed firearm and unlawful possession of a concealable firearm by a minor, committed J.S. to the Log Cabin Ranch School, and granted probation subject to various conditions. He contends the evidence was insufficient to prove he carried and possessed a concealed or concealable firearm, and that probation conditions prohibiting the possession and use of drugs, alcohol and weapons are unconstitutionally vague. J.S. also argues the court erred when it failed to specify his maximum term of confinement and precommitment custody credits in the dispositional order. We remand to the juvenile court to modify the conditions of probation to include a scienter requirement in the prohibition against drugs, alcohol and weapons and to specify the maximum possible confinement time and custody credits. In all other respects we affirm.

BACKGROUND

On the evening of January 29, 2014, San Francisco Police Officers Robert Trujillo and Craig Tiffe saw J.S., a suspect in a recent shooting, walking with his brother E.S. in the Mission District. Officer Trujillo had been informed that morning that J.S. was carrying a 9-millimeter gun and should be detained. The officers recognized the brothers from prior contact and investigation.

E.S. complied with Officer Trujillo's command to stop and was detained, but J.S. fled. Officer Tiffe drove after him, driving parallel to J.S. from a distance of about 20 to 25 feet away. When Officer Tiffe stopped at a red light , J.S. continued to run through the intersection and was "violently struck" by a car. He was knocked to the ground, but got up and resumed running. Tiffe activated his car's lights and sirens and followed in pursuit. Just beyond the intersection, J.S. appeared to discard a small black object to the ground. Officer Tiffe left the patrol car and apprehended J.S. after a short pursuit on foot. A "very small" black handgun, a 380 automatic with a loaded magazine and a laser sight, was found in the area where Officer Tiffe saw J.S. discard the black object. The parties stipulated that J.S.'s fingerprints were on the gun.

The People filed a juvenile wardship petition alleging carrying a concealed firearm (Pen. Code, § 25400, subd. (a)(2)) and possession of a concealable firearm by a minor (Pen. Code, § 29610).[1] Following a contested jurisdictional hearing the court rejected a defense contention that there was insufficient evidence the gun was concealed or capable of being concealed within the meaning of sections 25400 and 29610. "I am convinced, beyond a reasonable doubt, that [J.S.] possessed the gun because of all the circumstantial evidence I have in this case. He had the gun, and it was concealed. No one was able to see the gun until he did this tossing motion, and the gun then was discarded by him into

[1]Under section 25400, subdivision (a)(2), a person is guilty of carrying a concealed firearm when he or she "[c]arries concealed upon the person any pistol, revolver, or other firearm capable of being concealed upon the person." Section 29610 provides that "A minor shall not possess a pistol, revolver, or other firearm capable of being concealed upon the person."

Unless otherwise noted, further statutory citations are to the Penal Code.

the street. So the gun was concealed. [¶] And he carried it on his person. Circumstantially, that is clear too, beyond a reasonable doubt. It was capable of being concealed because he did conceal it." The court also rejected the defense argument that there was insufficient evidence the gun's barrel was less than 16 inches long. It explained: [I]n order for a jury or a judge to be satisfied it was substantially concealed, when part of it is showing, is the barrel has to be less than 16 inches in length. But that is when there is an issue of, whether it was substantially concealed or was it mostly not concealed. But in this case, it was entirely concealed."

At the dispositional hearing the juvenile court declared J.S. a ward of the court, removed him from his parent's home, and committed him to the Log Cabin Ranch School. The court granted probation on the condition that J.S. complete the Log Cabin Ranch School program and other probation terms that included prohibitions against possessing weapons, drugs and alcohol. This timely appeal followed.

DISCUSSION

I. Sufficient Evidence Supports The Concealed Firearm Allegations

Section 25400, subdivision (a)(2) makes it a crime to "carr[y] concealed upon the person any pistol, revolver, or other firearm capable of being concealed upon the person." Section 29610 prohibits a minor from possessing "a pistol, revolver, or other firearm capable of being concealed upon the person." As to both charges, J.S. asserts the prosecutor was required to prove the barrel length of the gun was less than 16 inches. We disagree.

J.S. principally relies on section 16530, subdivision (a), which defines the term "firearm capable of being concealed upon the person," and the bench notes to CALCRIM No. 2520. Section 16530, subdivision (a) provides that "the terms 'firearm capable of being concealed upon the person,' 'pistol,' and 'revolver,' *apply to and include* any device designed to be used as a weapon, from which is expelled a projectile by the force of any explosion, or other form of combustion, and that has a barrel less than 16 inches in length. These terms *also include* any device that has a barrel 16 inches or more in length which is designed to be interchanged with a barrel less than 16 inches in length." (Italics

added.) CALCRIM No. 2520, the instruction on carrying a concealed firearm in violation of section 25400, subdivision (a)(2), directs that the People must prove "1. The defendant carried on (his/her) person a firearm capable of being concealed on the person; [¶] 2. The defendant knew that (he/she) was carrying a firearm; [¶] AND [¶] 3. It was substantially concealed on the defendant's person." The instruction also provides, in brackets, the following alternative definitions of a concealable firearm, including two that refer to a barrel less than 16 inches long: "[A *firearm capable of being concealed on the person* is any device designed to be used as a weapon, from which a projectile is expelled or discharged through a barrel by the force of an explosion or other form of combustion and that has a barrel less than 16 inches in length. [A *firearm capable of being concealed on the person* also includes any device that has a barrel 16 inches or more in length that is designed to be interchanged with a barrel less than 16 inches in length.]" The bench notes direct that the court should give the bracketed definition unless it has defined the term in other instructions.

J.S. contends that section 16530 and the corresponding instruction define a firearm "capable of being concealed on the person" as being *restricted* to weapons with barrels less than 16 inches long. We have reservations about his interpretation of the statutory language, which states that the term "appl[ies] to and includes" weapons of that description. While plainly any firearm with a barrel shorter than 16 inches long thus qualifies as "capable of being concealed on the person," the statutory language is inclusive, not exclusive. Moreover, reading the statutory definition of concealable firearms to exclude weapons with barrels of 16 inches or longer *but that were in fact concealed* on the defendant's person would be antithetical to the legislative purpose of minimizing the threat to public safety posed by concealed weapons. (See *People v. Marroquin* (1989) 210 Cal.App.3d 77, 81–82.) J.S. relies on *People v. Boyd* (1947) 79 Cal.App.2d 90, 93, which reached the contrary conclusion, but its reasoning is entirely

conclusory[2] and, in our view, overlooks the inclusive nature of the statutory language. It does not surprise us, then, that *Boyd* has not been followed on this point in a published opinion in the nearly 70 years it has been on the books. (*Cf. People v. De Falco* (1959) 176 Cal.App.2d 590, 593 [distinguishing *Boyd* because circumstantial evidence supported implicit finding that the defendant's gun barrel was under 12 inches in length].)

In any event, in this case the evidence established beyond a reasonable doubt that the barrel of the gun J.S. discarded was shorter than 16 inches. Officer Poespowidjojo, who found the firearm, agreed that it was a "handgun." Officer Tiffe described the gun as a .380, "a very small black firearm," and a "small black object." It defies credulity to propose the officers would so describe a weapon whose barrel alone was at least 16 inches. In any event, the People introduced, and we have reviewed, a photograph of the gun adjacent to the curb where it was found. The barrel is substantially shorter than the width of the curb, and the proportions of the barrel to the trigger, guard, breech, and grip of the gun render it absurd to infer the barrel was anywhere near 16 inches in length. This evidence is sufficient to support the finding that J.S. was carrying a weapon "capable of being concealed upon the person" under any interpretation of section 16530.

II. J.S.'s Probation Conditions Must Be Modified

A. The Probation Conditions

At the dispositional hearing, the juvenile court orally imposed the following conditions of probation: "You are not to possess, have in your possession, or use any weapons. No guns, no ammunition, no toys that look like weapons. You are not to possess any objects you intend to use as a weapon. [¶] You are not to possess, use or have in your possession any drugs or alcohol, or any controlled substances. Nothing that

[2]More specifically, the court's statutory interpretation rested solely on its pronouncement that "[t]he wording of the statute, in defining these terms for the purpose of the statute as applying to and including all firearms having a barrel less than twelve inches in length, was clearly intended to make the statute inapplicable to firearms having a barrel twelve inches or more in length." (*Id*. at p. 93.)

makes you high."[3] J.S. contends these conditions are unconstitutionally vague on their face because they fail to include a knowledge requirement and are insufficiently precise. We agree these conditions must be modified to include a scienter requirement.

B. Analysis

A probation condition is unconstitutionally vague if it is not " ' "sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated." ' [Citation.] A restriction failing this test does not give adequate notice—'fair warning'—of the conduct proscribed. [Citations.]" (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153.) " 'In deciding the adequacy of any notice afforded those bound by a legal restriction, we are guided by the principles that "abstract legal commands must be applied in a specific context," and that, although not admitting of "mathematical certainty," the language used must have " 'reasonable specificity.' " ' [Citation.]" (*In re Shaun R.* (2010) 188 Cal.App.4th 1129, 1144, italics omitted.) J.S.'s challenge to his probation conditions as facially vague presents a pure question of law appropriate for de novo review. (*In re Sheena K.* (2007) 40 Cal.4th 875, 888–889; *People v. Cromer* (2001) 24 Cal.4th 889, 894.)

J.S. argues the weapons condition is facially vague because it fails to adequately specify what objects are encompassed within its scope. Thus, he argues, the condition as written fails to provide adequate notice of what is forbidden. We disagree. " '[C]onditions [of probation] need not be spelled out in great detail in court as long as the defendant knows what they are.' " (*In re Frankie J.*, 198 Cal.App.3d 1149, 1155.) The term "any weapons" is sufficiently clear to inform J.S. what objects he may not use or

[3]Although the oral pronouncement differs slightly from the minute order and the signed probation order, the record of the oral pronouncement of the court controls. (*People v. Farell* (2002) 28 Cal.4th 381, 384 fn. 2; *People v. Gabriel* (2010) 189 Cal.App.4th 1070, 1073; *cf. People v. Thrash* (1978) 80 Cal.App.3d 898 [affirming probation conditions not recited at sentencing hearing but included in written probation order].) Nonetheless, probation conditions must be clear to the probationer as well as to courts and law enforcement. Such clarity is elusive where, as in this case, there are inconsistencies between the minute order, the written probation order, and the court's oral pronouncement at sentencing.

possess. He argues he could be charged with a probation violation for possessing such seemingly innocuous objects as a pencil or a pillow, but his cited authorities establish that such items qualify as dangerous or deadly weapons only where the defendant *intends to use them* as such. (See *People v. Page* (2004) 123 Cal.App.4th 1466, 1471–1473 [pencil]; *People v. Simons* (1996) 42 Cal.App.4th 1100, 1107 [screwdriver]; *People v. Helms* (1966) 242 Cal.App.2d 476, 486–487 [pillow used in attempted smothering].) The juvenile court did not restrict the weapons condition to "dangerous" or "deadly" weapons, but the long-held principle that an otherwise innocuous object qualifies as a weapon if it is used with that intent should, as a matter of common sense, apply to J.S.'s weapons condition. Thus, for example, the "no weapons" admonition fairly informs J.S. that while he may use a pencil to take notes at school, he may not hold its sharpened point to someone's throat while taking the victim's money. (See, e.g., *People v. Page*, *supra*, 123 Cal.App.4th 1466.) That duality does not render the weapons condition unconstitutionally vague.

The probation condition that J.S. not use or possess "any drugs or alcohol, or any controlled substances" or anything that "makes [him] high" is also adequately clear. J.S.'s supposition that he could be held on a probation violation for taking aspirin or medically prescribed antibiotics, or even for ingesting sugar or caffeine, assumes a wholesale departure from the commonly understood meaning of the cited terms in this penal context, which we decline to take.

We agree, however, that the use and possession conditions must be modified to include a knowledge requirement. The appellate courts have held, albeit not uniformly, that probation conditions restricting a probationer's presence, possession, or association must include express scienter requirements to prevent the conditions from being unconstitutionally vague. (*In re Victor L.* (2010) 182 Cal.App.4th 902, 912 [knowingly in presence of weapons]; *People v. Freitas* (2009) 179 Cal.App.4th 747, 751–752 [knowing possession of gun or ammunition]; *People v. Lopez* (1998) 66 Cal.App.4th 615, 634 [knowing display of gang indicia]; but see *People v. Patel* (2011) 196 Cal.App.4th 956, 960 [implying scienter requirement].) We shall follow the majority practice and

require modification of the probation conditions to prohibit J.S. from *knowingly* using or possessing weapons, drugs or alcohol.

III. Maximum Term of Confinement

Under Welfare and Institutions Code section 726, if the juvenile court finds or continues a juvenile offender as a ward of the court and orders the minor removed from his or her parents' physical custody, its order "shall specify that the minor may not be held in physical confinement for a period in excess of the maximum term of imprisonment which could be imposed upon an adult convicted of the offense or offenses which brought or continued the minor under the jurisdiction of the juvenile court." (Welf. & Inst. Code, § 726, subd. (d); *In re Julian R.* (2009) 47 Cal.4th 487, 491, 497.) Both parties acknowledge, correctly, that the juvenile court failed to specify the maximum term of imprisonment. The omission must be remedied upon remand.

J.S. also points out that the court failed to award him precommitment credit for the time he served in juvenile hall before the disposition hearing or for any time he may have served between the disposition and his transportation and commitment to the Log Cabin Ranch School. "[A] minor is entitled to credit against his or her maximum term of confinement for the time spent in custody before the disposition hearing. [Citations.] It is the juvenile court's duty to calculate the number of days earned, and the court may not delegate that duty." (*In re Emilio C.* (2004) 116 Cal.App.4th 1058, 1067; *In re J.M.* (2009) 170 Cal.App.4th 1253, 1256 [credit for detention days between disposition and transportation to group home]; Pen. Code, § 2900.5.) Accordingly, the juvenile court must also calculate and specify J.S.'s custody credits upon remand.

DISPOSITION

The case is remanded to the juvenile court with instructions to modify the weapons, drug and alcohol conditions of probation to include a knowledge requirement and to specify J.S.'s maximum term of confinement and precommitment custody credits. The judgment is otherwise affirmed.

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Siggins, J.

We concur:

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Pollak, Acting P.J.

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Jenkins, J.